

STATE OF MICHIGAN
IN THE SUPREME COURT

(On Appeal from the Michigan Court of Appeals)

MEEMIC INSURANCE COMPANY,

Plaintiff-Appellant,

vs.

ANGELA JONES,

Defendant-Appellee.

Docket No. 161865

Court of Appeals Docket No. 346361

Lower Court Case No. 18-005480-CK

Hon. John H. Gillis, Jr.

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**PLAINTIFF-APPELLANT MEEMIC INSURANCE COMPANY'S REPLY TO THE
BRIEF IN OPPOSITION TO THE APPLICATION FOR LEAVE TO APPEAL**

ORAL ARGUMENT REQUESTED

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26. Rights and Duties of Mortgagee Contract

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I. Defendant-Appellee Concedes That There are Two Contract's in This Case, Which is Dispositive of This Matter Because the Contract With the Mortgagee Was Not Rescinded and Contains the Right to Subrogation

Defendant-Appellee Angela Jones concedes: "The Policy contains two contracts. Meemic rescinded its contract with Jones. Meemic owed CitiMortgage pursuant to a separate contract." (Opposition Brief, p 8) Jones assumes that the rescission of her contract must rescind the right to subrogation. But that is false. The equitable, statutory, and contractual right to subrogation is not in the contract with Jones but is found in the contract with Citi.

"An insurance policy is much the same as any other contract." *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566-567; 489 NW2d 431 (1992). "A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written*. Courts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract." *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005), emphasis original, citation omitted. Thus, the Court must turn to the actual language of the contract between plaintiff-appellant Meemic Insurance Company and the mortgagee Citi to determine the rights provided therein.

The contract with Citi is contained in the portion of the policy entitled "Rights and Duties of Mortgagee":

Rights and Duties Of Mortgagee. The term "mortgagee" includes a trustee or a land contract holder, if applicable.

If a mortgagee is named in the Declarations, any payment for loss under Coverage A or B will be made to the mortgagee and **you**, as interests appear. If more than one mortgagee is named, payment will be made in the order of priority of the mortgagees.

The interest of the mortgagee under this policy will not be affected by any action or neglect by you. The interest of the mortgagee under this policy will terminate unless it notifies **us** of any change of ownership, occupancy or substantial change in risk of which the mortgagee has knowledge and pays upon

demand any premium due if **you** fail to do so.

We will notify the mortgagee if **you** fail to give **us** proof of loss. Within 60 days after receiving such notice, the mortgagee must give **us** proof of loss. Policy conditions relating to appraisal, time of payment and time of bringing lawsuit apply to the mortgagee.

We will give the mortgagee not less than 10 days notice of cancelation or nonrenewal of the insurance protecting its interest.

If **we** pay the mortgagee for any loss and deny payment to **you**:

- A. ***we will be subrogated to the extent of our payment to all the rights that the mortgagee has under the mortgage on the property; or***
- B. at **our** option, **we** may pay to the mortgagee the whole principal on the mortgage and any interest due. In this event, **we** may receive a full assignment and transfer of the mortgage and all securities held as collateral for the mortgage debt.

Subrogation will not impair the right of the mortgagee to recover the full amount of the mortgagee's claim. [Policy, Appendix 11 p 15, italic emphasis add; Rights and Duties of the Mortgagee Contract, Appendix 26.]

Applying this contract between Meemic and Citi as written provides all of the necessary answers in this case. First, can Jones's actions, fraud, and misrepresentations that led to the rescission of her contract also cause the Citi contract to be rescinded/declared void? No. "***The interest of the mortgagee [Citi] under this policy will not be affected by any action or neglect by you [Jones].***"¹ (Appendix 26) Second, will payment by Meemic under the Citi contract create

¹ *Fashho v Liberty Mut Ins Co*, __Mich App__; __NW2d __; 2020 WL 5580169 (Docket No. 349519, issued September 17, 2020), recently reaffirmed "[a]n insurer can reject fraudulent claims without rescinding the entire policy." (citing *Meemic Ins Co v Fortson*, __Mich__; __NW2d__; 2020 WL 4355288 (Docket No. 158302, issued July 29, 2020) *Fashho* and *Fortson* further distinguished *Haydaw v Farm Bureau Ins Co*, __Mich App __; __NW2d__; 2020 WL 3885175 (Docket No. 345516, issued July 9, 2020), a case involving fraud occurring during litigation. *Fashho* notes that *Haydaw* stands "for the unremarkable proposition that an insurer cannot assert that it denied a claim because of fraud that occurred after litigation began" because "that denial cannot possibly be based on an event that has not yet taken place." *Fashho*, slip op p 4. *Fashho* notes that *Haydaw* does not change the right enforce a provision voiding a policy for fraud occurring in the claims process. And *Fortson*, makes even more clear that fraud in formation of the contract allows for the insurer to rescind or void the policy as "[o]ne who has been fraudulently induced to enter into a contract has not assented to the agreement since the fraudulent conduct precludes the requisite mutual assent to form a contract." *Fortson*, __Mich __; slip op pp 14-15. Putting this law together, Jones's fraud in forming her portion of the

a right to subrogation? Yes. “If we pay the mortgagee for any loss and deny payment to you... *we will be subrogated to the extent of our payment to all the rights that the mortgagee has under the mortgage on the property.*” (Appendix 26) Did Meemic pay the mortgage Citi? Yes. As Jones concedes, Meemic paid Citi \$53,356.49. (Brief in Opposition, p 4; Mortgagee Check, Appendix 13) Did Meemic deny coverage to Jones? Yes. Meemic explicitly denied coverage to Jones: “*Therefore, your claim on September 28th, 2015 is denied.*” (Denial & Rescission Letter, Appendix 5, p 3²) Does Meemic thus have a right to subrogation for the \$53,356.49? Yes. “[W]e will be subrogated to the extent of our payment....” (Appendix 26) Thus, given that Jones has conceded that the separate contract existed with Citi, given that Michigan law requires the application of the plain language of that separate contract with Citi as written, and given that that separate contract language provides that the contract with Citi cannot be rescinded because of Jones’s actions and misrepresentations and recognizes the equitable and statutory right to subrogation based on the payment, the trial court correctly granted Meemic summary disposition and the Court of Appeals erred as a matter of fact and law in reversing that decision. *Rory*, 473 Mich at 468; *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 383-384; 486 NW2d 600 (1992).

Jones’s entire thesis is that “[t]here is nothing upon which Plaintiff Meemic can rely to seek subrogation....” (Brief in Opposition, p 6) Jones relies on *Cushman v Avis*, 28 Mich App 370; 184 NW2d 294 (1970) for this argument. *Cushman* provides: “Rescission abrogates *the* contract completely.” *Id.* at 372, emphasis added. This is clearly a correct and well-established statement of the law. *Cushman*, however, is not an insurance case and does not address standard

contract creates the right to rescind her contract from the inception, rendering it void, but it does not rescind the entire policy, as a separate contract of insurance exists between Citi and Meemic that cannot be made void by Jones’s actions.

² As outlined in the application for leave to appeal, it was on this step that the Court of Appeals erred, apparently failing to read the relevant letter or failure to understand the impact of the fact

mortgage clauses. Jones's concessions in the remainder of the brief demonstrate why her thesis is wrong and *Cushman* is inapplicable to this matter. Simply put, there are two contracts in this case and only "the" contract between Jones and Meemic was rescinded, not the second contract between Meemic and Citi.

Jones concedes that the two contracts exist and that the intent of the two separate contracts is to protect the interest of Citi, the mortgagee:

The policy includes a standard mortgage clause, which creates a separate and independent contractor between the lienholder (mortgagee CitiMortgage) and Meemic. "In other words, there are two contracts of insurance within the policy—one with the lienholder and the insurer and the other with insured and the insurer." Foremost Ins Co v Allstate Ins Co, 439 Mich 378, 383-384; 486 NW2d 600 (1992). This clause "simply protects the lienholder's insurable interest in accordance with what the insurer promised to do." Foremost Ins Co, supra, 392. [Brief in Opposition, p 6.]

Applying what these facts and law actually provide requires reversal. Two contracts existed. The second with Citi protected Citi's interest. Only "the" contract with Jones could be rescinded by her actions given that the entire purpose of the standard mortgage clause is to protect the separate interest of the mortgagee:

[I]t effects a new and independent insurance which protects the mortgagee as stipulated, and which cannot be destroyed or impaired by the mortgagor's acts or by those of any person other than the mortgagee or someone authorized to act for him and in his behalf. [*Foremost Ins Co*, 439 Mich at 389-390 n28, citation omitted.]

Thus, Jones is wrong in concluding that her fraud and misrepresentation leading to the voiding/rescinding of her separate contract could destroy the protections created by the standard mortgage clause and the accompanying right to subrogation contained in that separate contract. "Every jurisdiction that has considered this issue in light of the same or similar standard loss payable clauses has concluded that the lienholder's interest in the insured's property will not be

that Jones specifically admitted that Meemic denied coverage. (See Application, pp 15-29)

avoided by any acts, representations, or omissions of the insured.” *Id.* at 389. The Court of Appeals should be peremptorily reversed in light of the actual law and Jones’s factual concessions.

Jones argues that Meemic’s attempt to enforce the separate contract with Citi as written and to enforce the contractual, statutory, and equitable right to subrogation is a policy argument rejected in *Foremost Ins Co.* (Brief in Opposition, p 6-7) In fact, the actual public policy argument being raised in *Foremost Ins Co* was Allstate’s attempt ***not to enforce a standard mortgage clause, the exact opposite of what Meemic argues.*** *Id.* at 391-392. *Foremost Ins Co*, in addressing this issue, specifically stated why enforcing the provisions of the standard mortgage clause like Meemic seeks to do in this case is important:

Allowing a lienholder to recover its interest in the property that was intentionally destroyed by the insured under a standard loss payable clause simply protects the lienholder’s insurable interest in accordance with what the insurer promised to do. That is, the insurer promised to cover the lienholder’s security interest in the insured’s automobile regardless of any act or neglect of the insured. [*Id.* at 392.]

Jones’s argument and the Court of Appeals’ decision is a rejection of *Foremost Ins Co* and all of the other cases from this Court on the issue. The rejection of the century of precedent enforcing standard mortgage clauses and their necessary supporting right to subrogation for the first time made by the Court of Appeals in this case is undeniably a sea change in the law.

II. The Court of Appeals Decision Conflicts With This Court’s Precedent

As noted above, the Court of Appeals decision is a rejection of *Foremost Ins Co*, 439 Mich at 383-384, 392, regarding the enforceability of the separate contract created by the standard mortgage clause and the rule of law explained in *Rory*, 473 Mich at 468, requiring insurance policies to be enforced as written. But even more specifically, the Court of Appeals’ decision is directly contrary to *Citizens State Bank v State Mut Rodden Fire Ins Co*, 276 Mich

62; 267 NW 785 (1936). Jones asserts that *Citizens State Bank* does not address the issue of application of a subrogation provision after rescission of the policy. (Brief in Opposition, p 7) This is false. *Citizens State Bank* directly addressed the issue and found that the separate contract with the mortgagee survived the misrepresentations of the insured rendering the insured's/mortgagor's policy void. In that case, this Court specifically stated that the insured/mortgagor committed a misrepresentation in the application that **voided the policy**: "The misrepresentations appear to have been material ones and would void the policy as to the mortgagor." *Id.* at 70-71. Despite the fact that the misrepresentation rendered the policy void, i.e. rescinded it, the Court concluded that the insurer was required to pay the mortgagee because of the language of the standard mortgage clause:

It is a condition in the mortgage clause that the insurance company whenever it "shall pay the mortgagee (or trustee) any sum for loss or damage under this policy; and shall claim that as to the mortgagor or owner, no liability therefor existed, * * * shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payments shall be made, under all securities held as collateral to the mortgage debt * * * and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of their claim." [*Id.* at 70, quoting the mortgage clause.]

Simply, this Court ruled that "[t]he misrepresentations appear to have been material ones and would void the policy as to the mortgagor." *Id.* at 70-71. The case was then remanded to determine the amount of the subrogation right. *Id.* at 71. The exact same thing happened here. Jones's misrepresentations rendered her contract void, but her actions could do nothing to the separate contract with the mortgagee, which contained the right to statutory and equitable subrogation. Thus, by the precedent of *Citizens State Bank*, Meemic is entitled to subrogation regardless of whether Jones's actions rendered her portion of the policy void. As outlined in the Application for Leave to Appeal, pp 25-29, 33-42) every other case throughout the country to

deal with the issue reached the same decision as *Citizens State Bank* other than this panel of the Court of Appeals. Neither Jones nor the Court of Appeals have cited a single case from any court in the country that ever reached a contrary decision. Under the circumstances, the Court of Appeals was bound by *Citizens State Bank*, *Foremost*, *Rory*, and the decades of precedent it ignored. Therefore, the Court of Appeals' decision should be peremptorily reversed.

III. The Statutory Right to Subrogation Could Not be Rescinded and Was Not Rescinded Based on Jones's Fraud and Misrepresentation

The standards set by statute for a Michigan standard fire policy provide that each fire insurance policy in Michigan must provide the right to declare a policy void i.e. rescinds it for fraud and misrepresentations like the ones committed by Jones in this case: "Each fire insurance policy issued or delivered in this state shall contain the following provisions"... "That the policy may be void on the basis of misrepresentation, fraud, or concealment." MCL 500.2833(1)(c). The same statute then provides for the protections afforded to the insurer and the mortgagee when the insured/mortgagor commits fraud and misrepresentations rendering the policy void as occurred in this case:

If the insurer *claims that no liability existed as to the mortgagor* or owner, *it shall*, to the extent of payment of loss to the mortgagee, *be subrogated to all the mortgagee's rights of recovery*, but without impairing the mortgagee's right to sue; or the insurer may pay off the mortgage debt and require an assignment of the debt and of the mortgage. Subrogation pursuant to this subdivision shall include contractual as well as tort rights of action, but only to the extent of the loss. An action may be maintained by either the insured or insurer or by both of them jointly, to recover their respective portions of the loss. [MCL 500.2833(1)(j), emphasis added.]

Thus, by statute, Meemic had the right to rescind the contract with Jones making it void as provided in the statute, but that action has no affect on the right to subrogation, which is specifically recognized in the same statute. MCL 500.2833. A statute must be construed as written adding nothing that is not in the language of the statute itself. *Roberts v Mecosta Co Gen*

Hosp, 466 Mich 57, 63; 642 NW2d 663 (2002). Jones has no right to ignore the right to subrogation recognized in the statute or to rewrite the statute to provide that a void policy does not allow for the right to subrogation contrary to the language of MCL 500.2833(1)(j). Again, binding law directly negates Jones's argument and mandates reversal of the Court of Appeals.

IV. The Right To Equitable Subrogation Was Not Waived

Michigan law has long recognized the basic right to subrogation where, as occurred here, a person is required to pay off a debt that another person owes to a third party:

Equitable subrogation is a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other. It is well-established that the subrogee acquires no greater rights than those possessed by the subrogor, and that the subrogee may not be a "mere volunteer." [*Hartford Accident & Indem Co v Used Car Factory Inc*, 461 Mich 210, 215; 600 NW2d 630 (1999).]

"Equitable subrogation is a flexible, elastic doctrine of equity." *Id.* "It is proper in all cases to allow it where injustice would follow its denial..." *Stroh v O'Hearn*, 176 Mich 164, 177; 142 NW 865, 869 (1913). In this case, there can be no dispute that Meemic paid off Jones's debt to Citi and that, as Jones's concedes, Meemic was required to do so because of the separate contract with Citi. (Brief, in Opposition, p 8) Thus, Meemic is entitled to subrogation in this case.

Jones has no defense to this law, so she attempts to argue that Meemic waived the right to subrogation. (Brief in Opposition, pp 7-8) This is again false. Meemic's complaint laid out its payment to Citi and the right to repayment through subrogation against Jones. (Current Case Complaint, Appendix 16, ¶¶ 33-37) "A waiver is the intentional relinquishment of a known right inducing the belief of an intention and purpose to waive it." *Knoop v Penn Eaton Motor Oil Co*, 331 Mich 693, 697; 50 NW2d 329, 332 (1951). Specifically asserting a right to subrogation certainly cannot meet the standard for waiving the right to subrogation.

Jones seems to be implying that the discussion of the contractual provisions regarding the

right to subrogation amounts to a waiver of equitable subrogation. Jones cites no authority for this argument, and none exists. The contractual provision, and equally the statute discussed above, do nothing more than set forth the preexisting right to equitable subrogation. The right is not altered by the contractual provision or the statute in any way. They are simply a codification and restatement of the equitable right that Meemic would have regardless of their existence.

Simply put, the right to subrogation is not based on and has nothing to do with the insurance policy with Jones and thus cannot be affected by the rescission of that policy. The duty to pay the mortgagee exists because of the separate contract between the mortgagee and the insurer created by the standard mortgage clause. Therefore, Meemic was duty bound to pay Citi in this case. But once Meemic complies with that duty, it automatically becomes entitled to a right of subrogation because it has paid off a debt actually owed by Jones. *Hartford Accident & Indem Co*, 461 Mich at 215. The equities are inherently on the side of Meemic, and equitable subrogation “is proper in all cases to allow it where injustice would follow its denial....” *Stroh*, 176 Mich at 177. This is perhaps the clearest example of when such injustice exists. Should Jones’s fraud and misrepresentation to obtain an insurance policy entitle her to have her entire mortgage paid off with no right to subrogation and all of her premium payments returned to her? Obviously, the equitable answer is no. The Court of Appeals was misled into creating this inequity contrary to the existing law. Therefore, the Court of Appeals erred in reversing the trial court, and this Court should peremptorily reverse the Court of Appeals.

RELIEF REQUESTED

This Honorable Court should peremptorily reverse the Court of Appeals and order that the trial court’s order granting Meemic summary disposition be reentered. In the alternative, this Court could grant the application and set argument on this matter given that the Court of Appeals’ decision is a departure from decades of precedent and a sea change in the standard

mortgage clause law in the country. Meemic further requests that all costs be imposed on Jones.

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing pleading(s) has been electronically filed with the Clerk of the Court via the Electronic Case Filing system on the date shown below, which will send notice of filing to all attorneys of record.

/s/Cheryl A. Pinter

Legal Assistant, Harvey Kruse, PC

DATED: October 5, 2020

Respectfully submitted,
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